Supreme Court, U.S.
FILED

95-1172 APR 10 1996

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

RAFAEL SANJUAN, M.D.and
MARCELLO A. MAVIGLIA, M.D,

Petitioner(s)

vs.

THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY, INC., and

STEPHEN C. SCHEIBER, M.D.,

Respondent(s).

Petition for Writ of Certiorari To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICIA L. JOHNSON
Counsel of Record
Attorney for the Petitioners
203 North La Salle-Suite 2100
Chicago, Illinois 60601
(312) 558-1483

65 pp

QUESTIONS PRESENTED

1. Whether the Petitioners have asserted claims upon which federal relief may be granted?

2. Whether antitrust violations involve factual determinations?

3. Whether the United States Supreme Court should interfere in a board certification process where it appears that the oral examination is not duly authorized and misconduct is rampant amongst the examiners, the grading is done in a non-customary manner of unusual standards, and where the internal appeals process failed to at a minimum review any portion of the Petitioners' oral examination answers?

4. Whether the Respondents engaged in concerted activity with others and unduly burden interstate commerce?

5. Whether the Respondents have placed an arbitrary and capricious restraint on International Medical Graduates ("IMGs")(formerly known as Foreign Medical Graduates)("FMGs") specializing in the field of psychiatry?

6. Whether the District Court failed to review Petitioners' claims against the Respondents pursuant to Rule 9(b) of the Federal Rules of Civil Procedure?

7. Whether the Respondents are quasi-state actors who are violating numerous clauses of the United States Constitution?

8. Whether the ABPN defamed the Petitioners' by publishing false statements stating that the Petitioners had failed the psychiatry board certifying examination?

9. Whether a federal district court judge is medically trained to determine whether a psychiatrist has passed a board
certifying examination?

10. Whether the ABPN's alleged Release is against public policy?

11. Whether all of the Petitioners' pleadings were actually reviewed by the District Court and the United States Court of Appeals for the Seventh Circuit?

LIST OF PARTIES

Petitioner, Rafael Sanjuan, M.D.(Petitioner), is an individual. The second named Petitioner, Marcello A. Maviglia, M.D. (Petitioner) is also an individual.

Respondent, The American Board of Psychiatry and Neurology, Inc. (ABPN), has filed on record as a non-profit corporation. The second named Respondent, Stephen C. Scheiber, M.D. (Scheiber), is a corporate officer of the ABPN.

TABLE OF CONTENTS

Questions Presented.....i

List of Parties.....iii

Table of Contents.....iv

Index to Appendix.....vi

Table of Citations (Authorities).....vii

Opinion(s)Below.....1

Jurisdiction.....1

Statement of the Case.....1

A. Factual Statement of the Case...1

B. Procedural Statement of the Case.....4

Reasons for Granting the Writ.....6

I. The Petitioners Have Proffered Claims Upon Which Relief May Be Granted.....7

A. Genuine Issues of Material Fact Remain in Dispute.....8

1. Genuine Issues of Fact and Law Remain with Respect to Antitrust Violations Committed by the ABPN and Steven Scheiber.....9

(i) Petitioners Have Pleaded and Proved More Than De Minimis Activity.....14

(ii) The 'Rule of Reason' Analysis is Applicable in the Instant Case.....16

B. Genuine Issues of Fact Remain with Respect to the Petitioners Claim Pursuant to Fed. R. Civ. P. 9(b).....18

C. The District Court Erred in Failing to View All Inferences in the Light Most Favorable to the Non-Moving Party.....19

II. The Lower Federal Court Should Have Addressed the Illinois State Claim Against the Respondents for Defamation.....21

III. The Respondents' Purported Release is Unconscionable and Against Public Policy.....22

IV. The Respondents are Quasi-state Actors.....23

V. The Appellate Court Failed to Correctly Read and Review the Petitioners' Complaint and Erroneously Analyzed and Wrote a Decision Based Upon a Misapprehension of Facts.....28

Conclusion.....30

Appendix.....a1

INDEX TO APPENDIX

Appendix A. Opinion of the United States Court of Appeals, Seventh Circuit, Decided on January 11, 1995.....a1

Appendix B. Opinion of the United States Court of Appeals, Seventh Circuit, Decided on November 21, 1994.....a4

Appendix C. Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, Decided on March 3, 1994.....a14

TABLE OF AUTHORITIES

Table of Cases

American Medical Ass'n v. United States, 317 U.S. 519 (1943).....17

American Society of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982)....11

Application of Peterson, 459 P. 2d 703 (Alaska 1969).....8

Bartman v. Allis-Chalmers Corp., 799 F. 2d 311, 312 (7th Cir. 1986).....8

Black v. Henry Pratt Co., 778 F.2d 1278, 1281 (7th Cir. 1985).....19

Business Electronics v. Sharp Electronics, 485 U.S. 717, 723(1988).....16

Chicago Bd. of Trade v. United States , 246 U.S. 231 (1918).....12

Cupples v. Watson, 204 F.2d 58 (D.C. Cir. 1953).....20

Dannhausen & Gas Industries Equip. & Appliance News, Inc. v. Business Publs. Audit of Cir., Inc., 797 F.2d 548 (7th Cir. 1986).....28

Dennis v. Sparks, 449 U.S. 24, 27 (1980).24

Devalk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326 (7th Cir. 1987).....8

Doctors, Inc. v. Blue Cross of Greater Phil., 490 F.2d 48 (3d Cir. 1973).....10

Duby v. American College of Surgeons, 468 F.2d 364, 367-68 (7th Cir.1972).....28

Eastern States Lumbers Dealers' Ass'n v. United States, 234 U.S. 600, 609 (1914)..15

First Nat'l Bank of Ariz. v. Cities Service Co., 391 U.S. 253(1968).....7

Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-98 (1975).....16, 17

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2(1984).....16

Juneau Square Corp v. First Wis.Nat'l Bank of Milwaukee, 624 F.2d 798 (1980).....16

Kaneria v. The American Bd. of Psychiatry & Neurology, 832 F. Supp. 1226 (N.D. ILL. 1993).....29

Lathrop v. Donoh, 367 U.S. 820 (1961)....24

Lugar v. Edmondson Oil Co., 457 U.S. 922(1982).....27

Malak v. Associated Physicians, Inc. , 784 F.2d 277, 281 (7th Cir. 1986).....27

Marrese v. Interqual, Inc., 748 F.2d 373, 383 (1984), *cert. denied*, 472 U.S. 1027 (1985).....12

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984).....16

Musso v. Suriano, 586 F.2d 59, 62 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1982).25

National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 678, 696 (1978)....16, 17

Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958).....12

Page v. Work, 290 F. 2d 323 (9th Cir. 1961).....10

Patel v. The American Bd. of Psychiatry & Neurology, No. 89-C1751, 1990 U.S. Dist. LEXIS 13264 (N.D. Ill. Oct. 4, 1990).....29

Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).....9

Regner v. City of Chicago, 789 F.2d 534, 536 (1986).....19

Rendell-Baker v. Kohn, 457 U.S. 830 (1982).....25

Rodeo v. Gillman, 787 F. 2d 1175 (7th Cir. 1986).....8

Schachar v. American Academy of Ophthalmology, 870 F. 2d 397 (7th Cir. 1989).....14

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).....9

Sniadach v. Family Finance Corp., 395 U.S. 337(1969).....27

Treister v. American Academy of Orthopaedic Surgeons, 78 Ill. App.3d 746, 756, 33 Ill. Dec. 501, 508, 396 N.E. 2d 1225, 1232 (1979).....27

Tulsa Professional Collection Serv. v. Pope, 485 U.S. 478, 486 (1988).....27

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).....11

United States v. Yellow Cab. Co., 332 U.S. 218(1947).....10

Van Daele v. Vinci, 51 Ill 2d 389, 282 N.E. 2d 728 (1972), cert. denied, 409 U.S. 1007, 93 S.Ct. 438, 34 L. Ed. 2d 300 (1972)....28

Virgin v. American College of Surgeons, 42 Ill. App. 2d 352, 368-71, 192 N.E. 2d 414, 422-424 (1963).....27

Weiss v. York Hosp., 745 F.2d 786, 812 (3d Cir.1984).....10,11

Wilk v. American Medical Ass'n, 895 F. 2d 352 (7th Cir. 1990).....14

Table of Statutes and Constitutional Amendments

Federal Rules of Civil Procedure

Fed. Rule Civ. Proc. 9(b).....5, 18

Fed. Rule Civ. Proc. 12(b)6.....5

Fed. Rule Civ. Proc. 33.....5

Fed. Rule Civ. Proc. 34.....5

Fed. Rule Civ. Proc. 56(c).....7, 8, 9

Fed. Rule Civ. Proc. 56(e).....9

United States Code

Government Organization and Employees, 5 U.S.C. §551(8) (1994).....26, 27

Sherman Antitrust Act, 15 U.S.C. §1 (1994).....10,13,16

Commerce and Trade, 15 U.S.C. §2 (1994)..11

18 U.S.C. §1001.....5

42 U.S.C. § 1983.....24

Constitutional Amendments

U.S. CONST. amend. XIV.....24, 25

Table of Secondary Authorities

American Bd. of Medical Specialties Research & Education Foundation, 1992 Annual Report and Reference Handbook 43.....2,26

John A. Benson, Jr., Certification and Recertification: One Approach to Professional Accountability, 114 Ann. Intern. Med. 238, 241 (1991).....4

Joel I. Klein, The Antitrust Law and Medical Specialty Certification in Legal Aspects of Certification and Accreditation 17 (Donald G. Langsley ed. 1983).....12

Rosemary Stevens, American Medicine and the Public Interest 253 (1971).....4, 17

Gerald E. Thomson, The Future Effects of Failure to Be Certified in American Bd. of Internal Medicine, 1989 Summer Conference Report 44 (1989).....28

Legal Encyclopedia

7 Am. Jur. 2d, Attorneys at Law §8.....8

Restatement(s)

RESTATMENT (SECOND) OF CONTRACTS §208, cmt.d(1979).....23

OPINIONS BELOW

A copy of the Opinion of the United States Court of Appeals for the Seventh Circuit, decided November 21, 1994 and is reprinted in Appendix ("App.) "A," *infra*. The order of the United States Court of Appeals for the Seventh Circuit, dated January 11, 1995, which amended the opinion issued on November 21, 1994, and denied Petitioners' petition for a rehearing is reprinted in App. "B". The Memorandum and Order of the United States District Court for the Northern District of Illinois, Eastern Division, dated March 3, 1994, is reprinted in App."C."

JURISDICTION

(a) The judgment granting the Respondents' motion to dismiss the Petitioners' complaint for failure to state a claim upon which relief, pursuant to Rule 12(b)(6) could be granted was rendered on March 2, 1994.

(b) The judgment of affirmance of the United States Court of Appeals for the Seventh Circuit was dated and entered on November 21, 1994.

(c) The judgment of affirmance, which amends the November 21, 1994 Opinion and denied the Defendants-Appellees' Petition for Rehearing, by the United States Court of Appeals for the Seventh Circuit was dated and entered on January 11, 1995.

STATEMENT OF THE CASE

A. Factual Statement of the Case

The first named Respondent, THE AMERICAN

BOARD OF PSYCHIATRY AND NEUROLOGY (ABPN) is a non-profit Delaware corporation, incorporated on August 9, 1984, and maintains its principal place of business in the State of Illinois. Since the early 30's, the ABPN has administered board certification examination in psychiatry. In 1933, American Psychiatric Association deemed the ABPN as a certifying organization. According to the American Board of Medical Specialties (ABMS), a specialty board "...administers examinations, and issues certificates to those who submit and pass its evaluations." American Bd. of Medical Specialties Research & Education Foundation, *1992 Annual Report and Reference Handbook* 43, 94 (1992). Furthermore, the ABMS claims the intent of the board certifying process, "is to provide assurance to the public that a certified medical specialist has undertook, an examination process designed to assess the knowledge, experience and skills requisite to the provision of high quality patient care in the [particular] specialty." Id. at 51. The second Respondent is STEPHEN C. SCHEIBER, M.D., the executive-vice president and duly appointed agent of the ABPN. In addition to his fiduciary obligations with the ABPN, he is the head administrator of the board certification examination in psychiatry. The first named Petitioner, RAFAEL SANJUAN, M.D., passed the requisite Federal Licensing Examination ("FLEX") in 1982, and is a board-eligible practising psychiatrist in the state of New York. The second Petitioner, MARCELLO A. MAVIGLIA, M.D., passed the requisite FLEX examination in 1988, and is also a board-eligible psychiatrist in the New York and New Mexico. Both DR. SANJUAN AND DR. MAVIGLIA practice in low socio-economic areas. DR. SANJUAN practices in the South Bronx, located in New York City. While DR. MAVIGLIA practices in Gallup, New Mexico, a rural area of New Mexico, and is currently completing a research fellowship at a major university's medical school. Both foreign medical school

graduates, passed THE ABPN's Part I written examination. However, after numerous attempts and further training, that far exceeds the experience of the ABPN examiners, THE ABPN has failed to issue passing grades on the Part II oral examination to either of the psychiatrists. During the Part II oral examination, both psychiatrists have been subjected to violations of due process, unequal treatment, defamation, and fraud and contend that they have been demanded to execute an unconscionable Release in contravention to public policy. Prior to filing their federal lawsuit, both psychiatrists made several attempts to communicate their concerns to the ABPN and SCHEIBER but were met with deaf ears and/or requested by the ABPN to shell out large sums of monies (i.e., $400-$700 fees) in order for the ABPN to partake in any type of cursory review or appellate processing of their Part II oral examination. (*See* App. A, B, C). Dr. MAVIGLIA had even inquired into administrative complaints with the New York State Department of Labor, Human Right Division and the Attorney General of New Mexico. However, both administrative agencies refused to handle the matter claiming that an administrative agency was the wrong forum for the allegations alleged. As a result of the ABPN's violations of the Petitioners' rights, they have now been subjected to the receipt of a "time limited" board certification as opposed to lifetime board certification, which they would have received if they were correctly certified prior to 1994. Additionally, the ABPN is subjecting the Petitioners to a contingent recertification based on the Petitioners passing future arbitrary and capricious examinations. Furthermore, the ABPN's board certification will have a significant impact on the Petitioners' hospital privileges, recognition by the Petitioners' peers and patients, and an increase in the standard of care in the field of psychiatry. A respected authority on certification, John A. Benson, Jr., M.D., has noted that board certification has practical implications that the specialty boards

cannot control. Additionally, some of the implications may include: salary benefits, lower malpractice insurance rates, admission to hospital staffs, election to membership in professional societies, and credibility in expert testimony. *See* e.g., John A. Benson, Jr., *Certification and Recertification: One Approach to Professional Accountability*, 114 Ann. Intern. Med. 238, 241 (1991).The United States of America, as well as the international venues have accepted the ABPN's board certification. Therefore, board certification has pervasive implications for all psychiatrists practising in the U.S.A. Psychiatry patients may also look to board certification when seeking a physician. According to medical experts today, [psychiatric] patients, especially the better educated and affluent, will often bypass generalists to deal directly with a specialist. *See* Rosemary Stevens, *American Medicine and the Public Interest* 253 (1971). Therefore, non-certified psychiatrists may be subjected to a competitive disadvantage vis-a-vis board certified psychiatrists.

B. Procedural Statement of the Case

After numerous attempts to resolve their disputes with the ABPN, the PETITIONERS decided to file their claim in the U.S. District Court for the Northern District of Illinois, Eastern Division. In March of 1994, the District Court granted the RESPONDENTS' motion for summary judgment and based on the March 3, 1994, Memorandum and Order, apparently failed to read the Petitioners' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss. Based on the genuine issues as to the numerous material of facts as set forth in their Complaint, DR. SANJUAN and DR. MAVIGLIA filed a Notice of Appeal to the Seventh Circuit Court of Appeals. The PETITIONERS have asserted a multitude of claims against the alleged non-profit certifying board of psychiatry for alleged illegal activities and constitutional violations in the

administration, testing and grading of their Part II oral examination in psychiatry. Their claims include violations of the federal and state constitutions under the due process clauses and violations which contradict the equal protection of the laws; antitrust claims under the Sherman Anti-Trust Act, defamation; the invalidity of the ABPN's Release which violates public policy; activities which unduly burden Interstate Commerce; fraud and mail fraud pursuant to federal statutes: Fed. R. Civ. P. 9(b) and 18 U.S.C. §1001. The PETITIONERS filed their brief on September 22, 1993. Although the RESPONDENTS' counsel had appeared in a similar case to the instant case, counsel filed a Motion for an Extension of Time to file their Answer alleging that counsel was "out of town." The Plaintiff's attorney filed a Memorandum of Law in Opposition to Defendants' Motion for an Extension of Time and a Supporting Affidavit opposing the Defendants' Motion. However, although the Petitioners' attorney expressed objections on the record concerning the grant of an extension of time, on November 3, 1993, the Hon. James B. Moran granted the Defendants' Motion. However, the District Court allowed discovery to proceed prior to the Defendants' filing of its Answer. Accordingly, the Petitioners then proceeded to request Discovery pursuant to Fed. R. Civ. P. 33 and Fed. R. Civ. P. 34. One month later, the Defendants finally responded by filing a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss Petitioners' Complaint and a Motion to Stay Discovery. On December 3, 1993, the Petitioners' filed in court, 'Petitioners' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6).' The Petitioners' attorney also adamantly filed objections to a Stay of Discovery. However, the District Court Judge granted the Defendant's Stay. On December 13, 1993, the date the District Court Judge ordered the Defendant to file his Reply, the Petitioners filed a 'Motion for Leave Instanter to File a

Supplemental Memorandum of Law in Excess of 15 Pages'. However, at 9:35 a.m.,when Petitioners' attorney arrived at the District Court, she was informed that the case had already been called and the District Court Judge had denied the motion. Notably, on both of the two (2) occasions that Petitioners' counsel had appeared in the District Court, the calendar was not called until 9:45 a.m. However, on the very same date that the motion was denied, the Petitioners' counsel then filed a Second Motion for Leave Instanter to file a Supplemental Memorandum of Law in Excess of Fifteen Pages.. On December 17, 1993, although the Respondents' attorney did not appear, at 9:50 a.m., the District Court Judge called the calendar and accepted the Petitioners' Motion for Leave Instanter to File a Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss which the Judge said he would take "under advisement." Almost three months later, the Hon. James B. Moran granted the Defendants' motion for summary judgment. The plaintiffs are appealing the district court's decision based on its' failure to review the issues set forth in the 'Petitioners' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss'. Furthermore, the Petitioners are filing this appeal asserting that genuine issues remain in the instant case for trail, including the antitrust violations. Unfortunately, after appealing to the United States Court of Appeals for the Seventh Circuit, the district court's decision was affirmed, and apparently the Seventh Circuit also failed to review the case. The Seventh Circuit's apparent failure to adequately review this case was evident based upon its amended opinion filed on January 11, 1995, after the Petitioners pointed out the Seventh Circuit's failure to read the case in its Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONERS' HAVE PROFFERED CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

Pursuant to Fed. R. Civ. P.56(c), summary judgment is appropriate if the pleading, answers to interrogatories, admissions, affidavits, and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." According to the United States Supreme Court, a material fact is one which might affect the outcome of a suit under applicable law. Furthermore, this Court states, "summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See First Nat'l Bank of Ariz. v.Cities Service Co.*, 391 U.S. 253(1968). In *First Nat'l Bank of Ariz*, the Court went on to state that a party opposing a properly supported motion for summary judgment, "may not rest upon the mere allegations or denials of his pleading, but...must set forth specific facts showing that there is a genuine issue for trial." *Id.* In the present case, DR. SANJUAN and DR. MAVIGLIA have presented sufficient evidence supporting that their claimed factual disputes should be brought before a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 288-289, 88 S.Ct.at 1592. To add to the insult of the egregious conduct of the ABPN and SCHEIBER, the District Court made part of his rationale for his grant of Summary Judgment based upon his opinion, not law, that DR. SANJUAN and DR. MAVIGLIA did in fact fail the board certifying examination. The District Court Judge stated subjectively,in pertinent part. "In light of their failures they allege that ABPN's conduct constitutes defamation, fraud, discrimination, and violations of antitrust laws and due process requirements." The District Court Judge went on to state, in pertinent part: "Petitioners allege that ABPN disseminated defamatory information about them, but the gist of that

information is that ABPN did not certify plaintiffs because they did not pass the exam, which is in fact true." Last, the federal rules provide that summary judgment should be decided based upon a "showing that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The Seventh Circuit has repeatedly drew its reasonable inferences in the light most favorable to the non-movant party. *See Devalk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987); *Bartman v. Allis-Chalmers Corp.*, 799 F. 2d 311, 312 (7th Cir. 1986); *Rodeo v. Gillman*, 787 F. 2d 1175 (7th Cir. 1986.) Based upon the Seventh Circuit's findings of any genuine issues of material fact, the grant of summary judgment at the district court level is usually reversed. Alternatively, if there are no genuine issues of material fact, then the court reviews whether summary judgment is correct as a matter of law. *Devalk*, 811 F.2d at 327.

A. GENUINE ISSUES OF MATERIAL FACT REMAIN IN DISPUTE

The Complaint filed by the Petitioners in the United States District Court for the Northern District of Illinois, Eastern Division is riddled with issues of material fact which are in dispute. The issues left unanswered by the appellate court include: a) Whether an applicant for board certification is entitled to secure a hearing and an actual appeal when the applicant is aggrieved by the results of the oral examination administered by the ABPN. *See also, Application of Peterson*, 459 P. 2d 703 (Alaska 1969). b) Whether the Petitioners have been denied a review by the ABPN because the proceedings surrounding the oral examination and the grading of the oral examination are unfair and arbitrary. *See also*, 7 Am. Jur. 2d, *Attorneys at Law* §8. c) Whether the ABPN is precluded from

barring a person from becoming board certified in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment of the United States Constitution. *See also, Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). Then, pursuant to Fed. R. Civ. P. 56(e), DR. SANJUAN and DR. MAVIGLIA filed supporting documents beyond the pleading which include: (a)'*Petitioners' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Pursuant to Fed. Civ. P. 12(b)(6)'; (b) 'Petitioners' Motion for Leave Instanter to File a Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss.*' However, based upon the District Court's erroneous Memorandum and Order entered on March 3, 1994, DR. SANJUAN and DR. MAVIGLIA allege that the District Court Judge did not actually read, less take "under advisement", the document filed on December 13, 1993 entitled, 'Petitioners Second Motion for Leave Instanter to File a Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss." In the Petitioners' Supplemental documents, DR. SANJUAN and DR. MAVIGLIA went beyond a "bare contention" that an issue of fact exists in the present matter. See *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983). Also, summary judgment is generally not an appropriate remedy in cases involving antitrust violations because such claims, such as in the instant case, involve extensive factual determinations. *See* Fed. R. Civ. P. 56(c). Thus, in this case, Defendants' Motion for Summary Judgment was erroneously granted by the District Court, and erroneously analyzed and seriously misapprehended, and then affirmed by the Circuit Court of Appeals for the Seventh Circuit.

1. GENUINE ISSUES OF FACT AND LAW REMAIN WITH RESPECT TO ANTITRUST VIOLATIONS COMMITTED BY THE ABPN AND DR. STEPHEN

SCHEIBER

The United States has a longstanding national policy against economic arrangements that restrain interstate commerce. The private regulation by the ABPN of the board certifying process for psychiatrists unreasonably restrains and unduly burdens interstate commerce. Therefore, this Court should invoke liability against the ABPN pursuant to the Sherman Antitrust Act and related state legislation. Congress has regulated activities in interstate commerce which among other businesses cross state and adversely affect such commerce. The test revolves around essentially "not whether the businesses involved in the alleged activities were engaged in interstate commerce, but that the conduct complained of substantially affects interstate commerce." *Doctors, Inc. v. Blue Cross of Greater Phil.*, 490 F.2d 48 (3d Cir. 1973); *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961); *United States v. Yellow Cab. Co.*, 332 U.S. 218 (1947). In the present case, both psychiatrists are IMGs who engage in activities involving interstate commerce (i.e. entering into contracts with interstate insurers, treating out-of-state patients, and treating inter-state patients at community based mental health activities.) The Petitioners are restricted from serving on numerous state regulated positions due to the ABPN's failure to certify them in psychiatry. Pursuant to Section 1 of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. 1 (1988 & Supp. III 1992). As interpreted by the courts, a Section 1 claim requires three elements: (1) a contract, combination, or conspiracy; (2) restraint of trade; and (3) an effect on interstate commerce. *Weiss v. York Hosp.*, 745 F.2d 786, 812 (3d Cir. 1984). In the instant case, the structure of the ABPN that sets its' own standards for themselves and other physician-competitions in the filed of psychiatry may be

characterized as conspiracies amongst competitors in restraint of trade. *See American Society of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (member-officers of a nonprofit organization were also officers in a firm that competed with Plaintiff-Corporation and used their position within the American Society to economically disadvantage the Hydorolevel Corp.) This Court strictly stated that the member-officers of the non-profit organization were liable when their members act with apparent authority, as the ABPN has acted in the administration of the Part II oral examination. Section 2 of the Sherman Act provides a mandate against persons who monopolize or attempt to monopolize. It states in pertinent part: ""Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part o f the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, ..." *Commerce and Trade*, 15 U.S.C.§ 2 (1994). Courts interpreting this provision have recognized two factors necessary for a successful action: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Weiss*, 745 F.2d at 825 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). The ABPN, a monopoly in itself, has monopolized the board certification process in the field of psychiatry since its' anti-competitive conduct violates Section 2 of the Sherman Act. The ABPN certification process has acted as a restriction to protect certified physicians, consisting of non-IMGs from legally competing with IMGs. The ABPN was designed to protect board certified psychiatrists and recently enacted a board certification Grandfather Clause in order to insure protection. Furthermore, the ABPN has demonstrated its market power and has worked

hard to maintain its market power by administering Part II oral examinations with no actual internal appeals process. *See* Joel I. Klein, *The Antitrust Law and Medical Specialty Certification in Legal Aspects of Certification and Accreditation* 17 (Donald G. Langsley ed. 1983). The Sherman Act also requires that the activity under scrutiny substantially affect interstate commerce. The Seventh Circuit in *Marrese v. Interqual, Inc.*, 748 F.2d 373, 383 (1984), *cert. denied*, 472 U.S. 1027 (1985)(found the 'effects test' was satisfied in an antitrust challenge to a hospital's peer review system). In *Marresse*, the plaintiff-physician alleged that he treated out-of-state patients, purchased medicine, equipment, and medical supplies from out-of-state purveyors, derived revenues from Medicare, Medicaid, and out-of-state private insurance companies, and paid management and accounting fees to out-of-state consultants. Most courts, satisfy the 'effects test' even in instances where the activity has a predominantly local effect. The sole purpose for the Petitioners requesting this Writ of Certiorari is based upon the fact that lower federal courts have failed to acknowledge the statutory antitrust violations in this case. As early as the 1900's, this Court in *Chicago Bd. of Trade v. United States,* utilized the antitrust analysis now know as the "rule of reason." 246 U.S. 231, 238 (1918). In *Chicago Board*, this Court stated, "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Id. Thus, this Court, unlike the lower federal courts should

consider the facts and circumstances of the restraint imposed upon the Petitioners by the ABPN. Subsequently, the Court developed a more stringent test to evaluate restraints recognized as having predominantly anticompetitive effects. As explained in *Northern Pacific Railway v. United States*, the "per se" rule covers: "... certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U.S. 1, 5 (1958). The 'vertical arrangements' involved in this antitrust action are the arrangements between the Petitioners and their medical suppliers and distributors who cross state lines. The 'horizontal arrangements' involve the Petitioners, who are international medical graduates, competing in the same type of economic activity with United States trained medical graduates. Tying arrangements involve the Petitioners' involvement with their clients, in which the services rendered are "tied" into state-run medical fee arrangements. Additionally, the Seventh Circuit has held, that "in determining whether Plaintiff has properly stated a nexus with an effect upon interstate commerce, [we] should consider only those allegations which tie Defendants' illegal actions to interstate commerce." In the instant case, the ABPN administers the Part II oral examination nationwide and requires applicants to travel interstate in order to take the examination. (*See* App. M, N) In order for a claim under Section 1 of the Sherman Act, three elements must be present. Namely that a 'contract' exists, a combination or conspiracy has taken place; as a result of such conspiracy an unreasonable restraint of trade has occurred in the relevant market; and there is an accompanying injury. *Sherman Anti-trust Act*, §1, 15 U.S.C.§1 (1994). The Petitioners alleged conspiratorial acts in the present case. The ABPN who is affiliated and was certified

by the American Psychiatric Association (A.P.A.), sanctioned by the American Medical Association (A.M.A.), and governed by the American Board of Medical Specialties has not received much, if any criticism from these governing boards since many of their respective members aspire to become "examiners." Based on all of the negative criticism and complaints received by these additional boards, DR. SANJUAN and DR. MAVIGLIA allege that these particular boards are part of the conspiracy to limit the certification of IMGs. (*See* App. E, F, G, H, I, J, K, L). Furthermore, several ABPN examiners who are affiliated with other governing boards travel interstate administering the examinations. For example, Richard Shader, M.D., the former Chair of a Task Force to Facilitate Communication Between the American Psychiatric Association and the ABPN, was charged with sexual harassment of female employees, some of who claimed to be examiners, while "traveling around the country administering tests for board certification. (See App. M, N). Thus, since the conspiratorial acts involved have a sufficient nexus with interstate commerce, the two sub-issues involving the illegal restraint of such examination activities and its impact on interstate commerce are genuine issues of material fact which remain in dispute. Last, the ABPN has failed to provide legitimate safety or ethical considerations to the standards it has set for administering the Part II oral examination. Therefore, this Court should apply the appropriate analysis with respect to the ABPN's antitrust violations. *See Wilk v. American Medical Ass'n*, 895 F. 2d 352 (7th Cir. 1990); *Schachar v. American Academy of Ophthalmology*, 870 F. 2d 397 (7th Cir. 1989).

(i) PETITIONERS HAVE PLEADED AND PROVED MORE THAN DE MINIMIS ACTIVITY

Antitrust laws do not allow recovery unless that has been a showing of more than a de minimis injury. Since 1933,

foreign medical graduates (presently referred to as IMGs) have been subjected to disparate and unequal treatment in the administration of the Part II oral examination. *(See* App. O, P, Q,R,S,T,U,V,W,X).. DR. SANJUAN and DR. MAVIGLIA who are IMGs are in the target area of foreign medical graduates since they both graduated from a foreign medical school. The Act further states, "once an agreement is shown to restrain interstate commerce, the legality of the agreement is determined by whether the restraint imposed is reasonable under all circumstance, except in those cases where character of restraint is such that it is regarded as unreasonable per se. Id. In order to determine whether a restraint is illegal depends upon whether it is reasonable or unreasonable. *Eastern States Lumbers Dealers' Ass'n v. United States*, 234 U.S. 600, 609 (1914). The ABPN and SCHEIBER have restrained IMGs for over two decades with no valid rationale for choosing to fail them in their Part II oral examination. Therefore, the restraint is unreasonable. Furthermore, since IMG's serve the general public especially in low socio-economic densely populated areas, the restraint is unreasonable. If an IMG psychiatrist is forced to continue to pay exorbitant fees for every allegedly informal/formal review of their examination, the impediment of denying board certification to foreign medical graduates is slim. DR. SANJUAN and DR. MAVIGLIA treat out-of-state patients, purchase medicine, equipment and medical supplies from out-of-state businesses. They also derive revenues from medicare, a federally run agency, and from medicaid,a state run medical assistance program. The purpose of the Sherman Act is to protect consumer welfare. Id. The ABPN enjoys the monopolistic power of limiting the psychiatry board certifying process of IMGs . (Id. at App. G, H, I, J) Thus, DR. SANJUAN and DR. MAVIGLIA have established at a minimum, "de minimis injuries" required under the Antitrust laws, and their complaint should not be dismissed because

genuine issues remain under the federal antitrust statutes.

(ii) THE 'RULE OF REASON' ANALYSIS APPLICABLE IN THE INSTANT CASE

Under the "rule of reason analysis to determine whether the ABPN's actions imposed an unreasonable restraint on competition, the Petitioners must show that challenged restraint ha an adverse impact on competition in the relevant market." *See Sherman Anti-Trust Act*, §1, 15 U.S.C.§1. In the instant case, the ABPN and SCHEIBER have demonstrated that they have conspired to achieve an unlawful objective and that the resulting restraint of trade of IMGs was unreasonable. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 723(1988). Utilizing the "rule of reason" analysis, the Petitioners contend that the ABPN and SCHEIBER's illegal restraint of failing IMGs has had and continues to have an adverse impact on the field of public service psychiatry, the relevant market where most IMGs choose to serve. In analyzing the "rule of reason" analysis, the courts do not presume that restrain to trade is illegal, but rather inquire into the actual effects of agreement on competition. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984.) An adverse effect upon competition, however small, is the distinguishing characteristic of restraint of trade in contrast to that of a business tort. *Sherman Anti-Trust Act*, §§ 1,2. In *Juneau Square Corp v. First Wis.Nat'l Bank of Milwaukee*, 624 F.2d 798 (1980), the Seventh Circuit stated, that "although the law recognizes that it may be impossible to conduct a business without in some degree restraining trade, the anti-trust law were enacted for the protection of competition." Id. at 81 This Court in *Goldfarb v. Virginia State Bar*, held that the professions would be afforded special treatment under antitrust laws. 421 U.S. 773, 788-98 (1975). *See also, National Soc'y*

of Prof. Eng'rs v. United States, 435 U.S. 678, 696 (1978)(the professions are entitled to rule of reason treatment where ethical norm which promote and regulate competition are involved.) The learned professions doctrine generally affords rule of reason analysis to professional activities that involve public service or ethical norms. *See infra* note 85 and accompanying text. The doctrine does not fashion a broad antitrust exemption for the professions under the rule of reason. *Id. at 696; Goldfarb. supra.* Over five decades ago, this Court reviewed antitrust liability involving the activities of specialty boards. In *American Medical Ass'n v. United States*, this Court revealed that organized medicine was subject to antitrust laws and that antitrust liability applied to attempts by organized medicine to limit the practice of physicians and influence hospital policies. 317 U.S. 519 (1943). According to the author of a well respected medical journal, Rosemary Stevens, "hospitals have been encouraged to utilize board certification as an important factor to grant privileges, as well as staff appointments. " *American Medicine and the Public Interest* 253 (1971). See also State Statutes requiring ABPN board certification. Under the Sherman Act, a claim must contain a contract, combination, or a conspiracy. In the instant case, a contract and a conspiracy are involved in the administration of the Part II oral examination. (*Id. at* App. M, N. and Z-27). Furthermore, there must be a restraint of trade in the relevant market area. Both, DR. SANJUAN and DR. MAVIGLIA are IMGs who are being restrained from entering the market area of board certified psychiatrists. (*See* App. H, I) . The effect on interstate commerce is the lack of "public service" oriented psychiatrists in the growing field of mental health care. Thus, the District Court erred in granting summary judgment without applying the "rule of reason" analysis to determine whether genuine issues of material fact remain based on the ABPN's alleged unreasonable restraint on competition.

B. GENUINE ISSUES OF FACT REMAIN WITH RESPECT TO THE PETITIONERS' CLAIM PURSUANT TO FED. R. CIV. P. 9(b)

Pursuant to Federal Rule of Civil Procedure 9(b), in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Both, DR. SANJUAN and DR. MAVIGLIA have set forth with particularity all the "averments of fraud" lodged against the ABPN and SCHEIBER.(*See* App. Y, Z.) Furthermore, in order to be actionable, fraud must "induce reliance." Both, DR. SANJUAN and DR. MAVIGLIA attempted to believe the initial results of the first Part II oral examination administered to them. After their respective initial Part II oral examinations, both psychiatrists acted by enrolling in board preparation courses and spending thousands of dollars and enrolling in "preparatory course." However, unbeknownst to both doctors, they had not enrolled in the "right" board certification course which would allow them access to the "actual" live patients who they would interview. According to reports made by applicants, several live patients are utilized by board preparation courses, and then actually "sit" at the Part II oral examination. Furthermore, under Illinois law, a false representing must be a representation as to an existing or past fact and not a mere promise to do some act in the future. According to DR. SANJUAN and DR. MAVIGLIA, the ABPN and SCHEIBER have made false representations in a writing entitled, "Information for Candidates," the "Preliminary Review and Appeal Process for Negative Determination Regarding Part II Examinations" and in the processing of its' alleged formal appeals. (*Id* at App. A, B and C). The Petitioners upon the ABPN administering a fair and honest examination. However, after taking the ABPN's examinations, the Petitioners allege that examinations are arbitrary, fraudulent, riddled with dishonesty in grading of answers, thereby preventing the

Petitioners from obtaining a passing grade on the Part II oral examination.(*See* App. D) The Petitioners further state that the ABPN failed and refused to review their examinations during the alleged internal appeals process. Last the Petitioners state that their answers to the Part II oral examination were never recorded, either by video and/or audio tape, therefore there could in fact be no actual appeals process. Therefore, the Petitioners allege that they were prevented from passing the ABPN's Part II oral examination through the ABPN'S fraudulent, imposition and coercive actions. The ABPN makes false representations in its grading process which is arbitrary, capricious and undoubtedly subjective. Last, the Petitioners have made clear unequivocal allegations of probative facts that would establish fraud, imposition, discrimination, or manifest unfairness on the part of the ABPN.

C. THE DISTRICT COURT ERRED IN FAILING TO VIEW ALL INFERENCES IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY

The 7th Circuit Court of Appeals has stated, "In determining whether any material fact remains in dispute, the court must view all inferences in the light most favorable to the non-moving party. *See Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985); *Regner v. City of Chicago*, 789 F.2d 534, 536 (1986). According to the March 3, 1994, Memorandum and Order, the District Court Judge has viewed this case in the light most favorable to the ABPN which is the moving party. Furthermore, the District Court did not read the examination questions or the Petitioners' answer, and still chose to write an opinion adverse to the Plaintiffs. Compare, *Cupples v. Watson*, 204 F.2d 58 (D.C. Cir. 1953)(trial judge read the examination questions and the applicant's answer to them and determined that by reasonable tests the graders acted fairly and without discrimination.) The District Court's

Memorandum and Order of March 3, 1993, alleges with no basis in law or evidence that the Petitioners: (1) Failed the disputed examination. However, the basis for the lawsuit revolves around the fact that DR. SANJUAN and DR. MAVIGLIA allege that the ABPN and SCHEIBER' have had certain motives for refusing to allow them board certification. (2) Allege that the ABPN is a "private association." However, The ABPN continues to be a non-profit Delaware corporation, that maintains its principal place of business in the State of Illinois. (3) Failed to satisfy "public function test. However, as a prerequisite to sitting for THE ABPN's board certifying examination, applicants must have an unlimited medical license to practice in the United States ("FLEX" examination and or the National Board of Medical Examiners examination-"NBME") Furthermore, THE ABPN presently requires all applicants to take a "State" administered examination, the United States Medical Licensing Examination ("USMLE".) The USMLE is a standard test formally adopted by the United States Department of Education. (4) Allege that in only Paragraph 43 of the Petitioners' Complaint does DR. SANJUAN and DR. MAVIGLIA state, if at all that their certification is an "economic necessity." To the contrary, the Petitioners have, in fact, alleged "economic necessity" throughout their Complaint. (5) Allege that the Petitioners have not pursued the "administrative route." However, the Petitioners, have in fact, pursued the administrative route. (6) Have only asserted harm to themselves and not any harm to any "market." To the contrary, DR. SANJUAN and DR. MAVIGLIA have, in fact, asserted harm to the market of IMGs (formerly Foreign Medical Graduates,)(FMGs) as well as themselves. (7) Allege that the Petitioners have only made "hints of allegations sufficient to state a claim for fraud. (8) State that "the ABPN did not certify Petitioners because they did not pass the exam, which is in fact true." To reiterate, this

is a disputable and genuine issue of material fact, of which, the District Court should not render a subjective personal opinion. Furthermore, the District Court & the ABPN has failed to provide facts and/or law attesting to the Petitioners actual failures of the Part II board certifying examination. Therefore, the Petitioners content that their alleged failure continues to be a disputed fact. (9)Allege that the "plaintiffs allege few (if any) facts regarding the release's invalidity, based upon the principles" of contrary to public policy," or that "there is something in the parties relationship militating against its enforcement." However, if the District Court had actually read and reviewed the pleading and opposition papers submitted by the Petitioners, the forgoing statements listed above as (1)-(8) would not have been in the light most favorable to the ABPN who is the moving party. For that matter, statements (1)-(8) would also not have been made in err to the ABPN's favor. Thus, based on the Complaint; the supporting opposition papers filed by the Petitioners; THE ABPN's and SCHEIBER's motives in denying the Petitioners' board certification have been raised and continue to be the source of controversy in this matter, thereby rendering the District Court's grant of summary judgment in err.

II. THE LOWER FEDERAL COURT SHOULD HAVE ADDRESSED THE ILLINOIS STATE CLAIM AGAINST THE RESPONDENTS FOR DEFAMATION

Under Illinois law, a Plaintiff can maintain suit for defamation without proof of special damages only if defamatory statement falls into one of the four "per se" categories: commission of crime; infection with type of communicable disease that could cause infected person to be shunned; malfeasance or misfeasance in performance of office or job; and unfitness for one's profession. The ABPN and SCHEIBER have defamed

the Petitioners by disseminating information that they have allegedly failed the board certifying examination; are unfit for the state and federal government appointments for board certified psychiatrists, and have unfairly disallowed their board certification in psychiatry. Furthermore, under Illinois law, whether publication was in fact understood as defamatory or to refer to plaintiff is a question for the jury should an initial determination as to whether statement may reasonably be innocently interpreted is resolved in favor of plaintiff. In the instant case, the allegations made by the Appellant concerning the defamatory remarks made by the Appellee should have been allowed to go before a jury and not summarily dismissed by the District Court. Petitioners have alleged in their Complaint that the ABPN and SCHEIBER have disclosed their alleged failing grade status to others and are therefore liable to Petitioners. The ABPN and SCHEIBER have stripped DR. SANJUAN and DR. MAVIGLIA of their liberty by taking away from them their right to be free from stigma imposed by their action in "announcing to the world " that because of their failure on the board certifying exam, DR. SANJUAN and DR. MAVIGLIA should take a review course. Thus, the District Court erred in granting the Defendants' motion for summary judgment because, under Illinois law, genuine issues of material facts remain concerning the DR. SANJUAN and DR. MAVIGLIA's claims against the ABPN and SCHEIBER for defamation.

III. THE RESPONDENTS' PURPORTED RELEASE IS UNCONSCIONABLE AND AGAINST PUBLIC POLICY

Although the District Court did not dismiss the Petitioners' case on the alleged strength of the release alone, the District Court erred in failing to read Petitioners' facts with respect to the invalid release. The District Court stated in its March 3, 1994, Memorandum and Order, "Although plaintiffs'

allege few (if any) facts regarding the release's invalidity, based upon the principles above the court declines to dismiss plaintiffs' complaint on the strength of the release alone." This statement made by the District Court is what confirmed DR. SANJUAN's and DR. MAVIGLIA's greatest suspicions concerning the summary dismissal. It appears that the court did not, in fact, read "Petitioners' Motion for Leave Instanter to File a Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss" . If the District Court had read this Memorandum of Law submitted by the Petitioners filed in court on December 10, 1994, the foregoing statement would not have been made concerning Petitioners' "facts." Further, the District Court failed to review the definition of an unconscionable contract. According to the Restatement (Second) of Contracts, "A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms." RESTATEMENT (SECOND) OF CONTRACTS §208, cmt. d (1979). The ABPN's purported Release costs the Petitioners almost Two Thousand ($2,000) Dollars in examination fees, requests a fee for the alleged appeals process, but provides no internal appeal process or documentation of such an appeals process. The bargaining power between the ABPN and the Petitioners is grossly unequal, in that the Petitioners do not have any bargaining power in the board certification process, no meaningful choice but to continue to retake the Part II oral examination that provides no answers or review, no real alternative is provided

by the ABPN. Unbeknownst to the Petitioners, the signing of the purported release is an assent to unfair and unreasonable terms. Furthermore, the Petitioners have not been given any other alternative, and were forced to sign the Release for purposes of obtaining board certification. Thus, the District Court erred in its statement concerning the invalidity of the purported release. The Petitioners allege it is unconscionable and further, it does not protect the Respondents from suit.

IV. THE RESPONDENTS ARE QUASI-STATE ACTORS

A private defendant acts "under color of "state law for purposes of the civil rights statute, when he is a willful participant in joint action with a state or its agents. *See* 42 U.S.C. 1983 (1988); CONST.AMEND. XIV. *Dennis v. Sparks,* 449 U.S. 24,27(1980)(an otherwise private person acts under color of state law when engaged in a conspiracy with state officials to deprive another of federal rights"). Furthermore, a private person does not act under "color of state law" unless he derives some "aid, comfort, or incentive," either real or apparent, from the state. The ABPN, alleged to be a non-profit corporation, derives financial assistance from the state, depends upon government legislation and the USMLE, and grants board certification to psychiatrists, nationally and internationally which allows psychiatrists to travel interstate for purposes of practicing psychiatry. In *Lathrop v. Donoh*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961), this Court held, "state action in the bar requirement that an attorney must be a member of the integrated bar association if he wishes to practice law, because a monopoly supply of lawyers was [thus] created." Similarly, a psychiatrist must be "board certified, also known as, a diplomate" in order to compete in the field of psychiatry, nationally. One major pre-requisite includes that all applicants have taken the state administered medical

examination, namely the USMLE. Furthermore, for purposes of the Fourteenth Amendment, state action can arise when a state delegates to a private party, a power traditionally exclusively reserved to the states. CONST. AMEND. XIV. Prior to 1933, psychiatrists were certified, by the prospective state licensing board, based on their state of residence.A private actor is considered a state actor for purposes of Fourteenth Amendment liability where there is a symbiotic relationship between the private actor and the state, where private discriminatory conduct is aggravated in some unique way by the involvement of governmental authority, state has commanded or encouraged private discriminatory action and private actor carries on traditional state functions. In the instant case, the ABPN was held by the District Court to not be a "state actor" for purposes of Fourteenth Amendment liability. However, the ABPN utilizes public hospitals to administer examinations. The ABPN also utilizes numerous examiners who are employed by state hospitals. Furthermore, state hospitals affirmatively support the ABPN's board certifying process and are actively recruiting board certified psychiatrists. *See Musso v. Suriano*, 586 F.2d 59, 62 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1982). The District Court in the instant case cites *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), as one of the leading cases defining "state action." However, what the district court failed to state is the proposition in *Rendell-Baker*, wherein this Court cites significant state encouragement as a prerequisite to finding state action. *Id.* at 840. The *Rendell-Baker* issue is whether the conduct of a private school which derives its income from public sources and which is regulated by public authorities was state action. Id. at 831. Last, *Rendell-Baker* requires, "the government function test to require that private discriminatory act to be based upon rule of conduct or policy put forth by the state. DR. SANJUAN and DR. MAVIGLIA contend that the ABPN performs a government

function by certifying board-eligible psychiatrists. The ABPN performs a distinctive, traditional government function in that it represents "assurance to the public that a certified medical specialist has successfully completed an approved education program and an evaluation, including an examination process designed to assess the knowledge, experience and skills requisite to the provision of high quality patient care in the filed of psychiatry." *ABMS Handbook*, at 51. The ABPN is unique in that it provides significant national interests to the general public and the medical profession. Also, in the eyes of the public, both national and internationally, the connection between the State and that of the ABPN is profound. The significant evidence that links the ABPN and the State is significant. The governmental interest is advanced when board certified psychiatrists are invited to take staff positions at State run hospitals. The examiners work for the State, the examinations are administered in State institutions, and members of the alleged internal appeals process work for State institutions. Although the ABPN alleges to be a private, not-for-profit corporation organized under the laws of the State of Delaware, it engages in federal contracts with hospitals in order to administer its' examinations. On the other hand, SCHEIBER is empowered with official power and the fiduciary obligation to act under 'color of state' law by administering the Part II oral examination, both nationally and internationally as well. The Administrative Procedure Act defines a license as "the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. *Government Organization and Employees*, 5 U.S.C.§ 551(8). The ABPN's board certification process falls under The Administrative Procedure Act since it administers the certification process for physicians specializing in psychiatry. Therefore, the licensing process of board-eligible psychiatrists is, in fact, governed by

federal statute. The factual dispute in the instant case, is whether the conduct of the defendants as a board certifying agency and agent for psychiatrists, nationally and internationally, constitute state action. Interestingly, under Section 1983, a private actor may be sued as if [it] were the itself, and in the case of joint action, make the state a potential defendant. *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 281 (7th Cir. 1986).Furthermore, this Court has held that 'state action' will be found when private parties make extensive use of state procedures with the "overt, significant assistance of state officials." *Tulsa Professional Collection Serv. v. Pope,* 485 U.S. 478, 486 (1988). *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922(1982); *Sniadach v. Family Finance Corp.*, 395 U.S. 337(1969). In *Treister v. American Academy of Orthopaedic Surgeons,* the Illinois Appellate court has held that the judiciary, "must refrain from interfering in the affairs of a private association absent a showing of economic necessity." 78 Ill. App.3d 746, 756, 33 Ill. Dec. 501, 508, 396 N.E. 2d 1225, 1232 (1979). The Illinois Appellate Court went on to interpret the Treister decision by stating "if the 'association' enjoys monopolistic power, the courts will ensure that such power is exercised according to principles of "procedural fairness." Id. at 752-57, 33 Ill. Dec. at 505-508, 396 N.E. 2d at 1229-32.; *Virgin v. American College of Surgeons*, 42 Ill. App. 2d 352, 368-71, 192 N.E. 2d 414, 422-424 (1963). However, the issue of economic necessity was not plead by the Petitioners since Board-certified physicians are widely believed to enjoy higher salaries than their non-certified physicians. As early as the 1930s, specialists were recognized as having consistently higher incomes than general practitioners. Some commentators believe that board-certified specialists earn more only because they work more hours than nonboard-certified peers. Others, however, note a significant income advantage to board certification without such

qualifications. Gerald E. Thomson, *The Future Effects of Failure to Be Certified, in American Bd. of Internal Medicine,* Summer Conference Report 1989 44 (1989). (Under Illinois law, as in most states, judicial inquiry into the affairs of private, voluntary associations is limited to the question of whether an association has treated its members with its by-law laws and rudimentary due process.*Duby v. American College of Surgeons*, 468 F.2d 364, 367-68 (7th Cir. 1972); *Van Daele v. Vinci*, 51 Ill 2d 389, 282 N.E. 2d 728 (1972), *cert. denied*, 409 U.S. 1007(1972); *Dannhausen & Gas Industries Equip. & Appliance News, Inc. v. Business Publs. Audit of Cir., Inc.*, 797 F.2d 548 (7th Cir. 1986). Thus, this court should review the activities and nature of the ABPN and make a finding that "state action is involved in the administration of the Part II oral examination."

V. THE APPELLATE COURT FAILED TO CORRECTLY READ AND REVIEW THE PETITIONERS' COMPLAINT AND ERRONEOUSLY ANALYZED AND WROTE A DECISION BASED UPON A MISAPPREHENSION OF FACTS

Based on the statements made, the Petitioners respectfully request that this Court review Petitioners' Motion for Leave Instanter to File a Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss, in conjunction with all of the documents submitted to this court. Furthermore, to avoid repetition, DR. SANJUAN and DR. MAVIGLIA allege, in particular, the following causes of action in this document: (a) Prima Facie Case of Fraud; (b) Mail Fraud; (c) Constitutional violations under the equal protection clause of the Federal Constitution. Furthermore, it appears that the aforesaid Supplemental Memorandum was not even at a minimum, taken "under advisement." Therefore, in light of the foregoing argument,the Petitioners respectfully

request that this court review in its entirety Petitioners' Opposition to the Motion for Summary Judgment, as well as the Supplemental Petitioners' Opposition to the Motion for Summary Judgment.In footnote 5 of the District Court's Memorandum and Order of March 3, 1993, the Court dismisses three (3) additional claims against the ABPN and SCHEIBER, with no rationale in law and or procedure. Furthermore, the District dismisses count XI which is a claim based on "economic necessity." Again, the District Court erroneously states in its March 3, 1994, Memorandum and Order that the "plaintiffs allege in very cursory fashion that ABPN has harmed them economically and professions. They do not come close to alleging that certification is an "economic necessity." However, again the District Court erroneously misinterpreted the statements made by DR. SANJUAN and DR. MAVIGLIA, which actually claim that the "certification process, itself, has harmed them (i.e. $700 application fee for every exam administration amounting to thousands of dollars solely in examination fees, etc.) Thus, the District Court has appeared to confuse the instant case with prior cases brought against the ABPN. In the instant case, the ABPN and SCHEIBER are both being sued and a total of eleven (11) claims were brought against them.Thus, this case is different than the prior litigation brought against the ABPN. *See Patel v. American Bd. of Psychiatry & Neurology*, No. 89-C1751, 1990 U.S. Dist. LEXIS 13264(N.D. Ill. Oct. 4, 1990)(motion for summary judgment denied since court found if jury believes psychiatrists's evidence, promissory estoppel theory would apply to ABPN's purported Release); *Kaneria v. The American Bd. of Psychiatry & Neurology*, 832 F. Supp. 1226 (N.D. Ill. 1993)(Court refrained from interfering in the application process because psychiatrist did not demonstration certification was economic necessity). Therefore, the United States Supreme Court should review this case and rule

accordingly based upon the Petitioners' valid allegations against the American Board of Psychiatry & Neurology, Inc., as well as against their corporate officer, Stephen Scheiber, M.D.

Conclusion

Thus, the gravamen of the Petitioners' request for Writ of Certiorari is that the ABPN and SCHEIBER continue to conduct illegal acts and restrain International Medical Graduates in interstate commerce as a result of their arbitrary and capricious conduct during the board certification oral examination process. Furthermore, the Petitioners were denied passage of the Part II oral board certifying examination through fraud, imposition, and coercion. The Petitioners were also not give a fair opportunity to take the Part II oral examination. Namely, the Petitioners have proffered clear unequivocal allegations of probative facts that establish fraud, imposition, discrimination, a manifestation of unfairness, as well as antitrust violations against the ABPN. The Petitioners' actions are permissible under federal law, as well as Illinois law, and are more than adequate as a matter of law. For all the foregoing reasons, the Petitioners respectfully request that the United States Supreme Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Dated: January 18, 1996

Respectfully submitted,

Patricia L. Johnson

PATRICIA L. JOHNSON
Attorney for the Petitioners
203 N. La Salle Street
Suite 2100
Chicago, Illinois 60601
(312) 558-1483

TO: JAMES RANKIN, ESQ.
KURT STITCHER, ESQ.
Attorneys for the Respondents
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAFAEL SANJUAN, M.D.,and

MARCELLO A. MAVIGLIA, M.D.,
Plaintiff-Appellants

vs.

THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY, INC., and

STEVEN C. SCHEIBER, M.D.,
Defendant-Appellees.

No. 94-1585

January 11, 1995, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 5806. James B. Moran, Chief Judge.

Original Opinion of November 21, 1994, Reported at: 1994 U.S. App. LEXIS 32958.

DISPOSITION: DENIED.

JUDGES: Before Hon. RICHARD D. CUDAHY, Circuit

Judge, Hon. JESSE E. ESCHBACH,
Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge

OPINION: Order

The court hereby amends the opinion issued on November 21, 1994, in the following respects.

1. In lieu of the first paragraph of the opinion, insert:

Psychiatrists Rafael Sanjuan and Marcello A. Maviglia passed written examinations and became eligible for certification by the American Board of Psychiatry and Neurology. Each took an oral examination administered by a panel of specialists under the Board's regulations; each failed. The Board will review a panel's conclusions if the applicant pays an appeal fee. Dissatisfied with the Board's procedures for internal appeals, Sanjuan and Maviglia filed this suit, which the district court dismissed under Fed. R. Civ. P. 12(b)(6). 1994 U.S. Dist. Lexis 2449, 1994-1 Trade Cas. P 70,618. They contend that the Board's examination practices violate the Sherman Act, the due process clause of the fourteenth amendment, and numerous principles of state law.

2. The first sentence after the block quotation on page 2 of the slip opinion is amended to read:

Plaintiffs went back on their word, suing instead of accepting the outcome of the internal appeals.

Plaintiffs-Appellants filed a "PETITION FOR REHEARING IN BANC", which is construed as a petition for rehearing and suggestion of rehearing en banc, on December 20, 1994. No

judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAFAEL SANJUAN, M.D.,and

MARCELLO A. MAVIGLIA, M.D.,
Plaintiff-Appellants

vs.

THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY, INC., and

STEVEN C. SCHEIBER, M.D.,
Defendant-Appellees.

No. 94-1585

November 21, 1994, Decided

SUBSEQUENT HISTORY: As Amended on Denial of Rehearing January 11, 1995, Reported at: 1995 U.S. App. LEXIS 565.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 5806. James B. Moran, Chief Judge.

COUNSEL:
For RAFAEL SANJUAN, M.D., MARCELLO A. MAVIGLIA, M.D., Plaintiffs-Appellants: Patricia L. Johnson, Chicago, IL, USA.

For AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY, INCORPORATED, a non-profit corporation, STEPHEN C. SCHEIBER, M.D., a corporate officer, Defendants - Appellees: James W. Rankin, Kurt E. Stitcher, KIRKLAND & ELLIS, Chicago, IL, USA.

JUDGES: Before CUDAHY, ESCHBACH, and EASTERBROOK, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION: EASTERBROOK, Circuit Judge.

Psychiatrists Rafael Sanjuan and Marcello A. Maviglia passed written examinations and became eligible for certification by the American Board of Psychiatry and Neurology. Each took an oral examination administered by a panel of specialists under the Board's regulations; each failed. The Board will review a panel's conclusions if the applicant pays an appeal fee. Dissatisfied with the Board's procedures for internal appeals, Sanjuan and Maviglia filed this suit, which the district court dismissed under Fed. R. Civ. P. 12(b)(6). 1994 U.S. Dist. LEXIS 2449, 1994-1 Trade Cas. P 70,618. They contend that the Board's examination practices' violate the Sherman Act, the due process clause of the fourteenth amendment, and numerous principles of state law.

When applying to the Board for certification, plaintiffs undertook to resolve any disagreements through the Board's

internal processes: I hereby release, discharge and exonerate the Board, its directors, officers, members, examiners, representatives and agents from any actions, suits, obligations, damages, claims or demands arising out of, or in connection with, this application, the grade or grades given with respect to the oral or written examinations or the failure of the Board to issue me [a] certificate. It is understood that the decision as to whether my examinations qualify me for a certificate vest solely and exclusively in the Board and that its decision is final.

Plaintiffs went back on their word, suing instead of accepting the outcome of the internal appeals. They complain about the high cost of the appeal (and of the application itself) without recognizing that costs would be higher still if disputes were resolved by the courts. The Board has spent far more than their application fees in defending this suit, which did not get past the pleadings stage. To fulfill its mission of identifying excellent specialists, the Board must disappoint others--for "when everyone is somebody, then no-one's anybody." W.S. Gilbert, in The Gondoliers (1889). The need to turn down many applicants implies a substantial risk of retaliatory litigation by physicians who esteem their abilities more highly than does the Board. Thus there may be substantial savings from bringing disputes back in house, and these savings redound to all applicants' benefits through lower fees.

Because the Board's headquarters are in Illinois, it submits--and plaintiffs agree--that Illinois law governs the validity of this release. Illinois enforces covenants not to sue (with an exception discussed at the end of this opinion). E.g., *Harris v. Walker, 119 Ill. 2d 542, 548, 519 N.E.2d 917, 919, 116 Ill. Dec. 702 (1988); Brady v. Prairie Material Sales, Inc., 190 Ill. App. 3d 571, 575, 546 N.E.2d 802, 805, 137 Ill. Dec.*

857 (2d Dist. 1989). So do other states, and medical boards with headquarters outside Illinois have not encountered difficulty in enforcing stipulations similar to the ones plaintiffs signed. *Balaklaw v. American Board of Anesthesiology, Inc., 149 Misc. 2d 11, 562 N.Y.S.2d 360, 362 (1990); Gates v. American Board of Pediatrics, Inc., No. 87-5321 (E.D. La. Apr. 12, 1988), affirmed, 859 F.2d 918 (5th Cir. 1988).* We enforced a no-suit agreement among owners of major league baseball teams. *Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978).* Plaintiffs assert that the releases are unconscionable contracts of adhesion, but they are no more so than the other standards for application, including paying fees and passing tests. If the Board as a private organization is entitled to set the rules of application and membership, it is entitled to insist that applicants agree to a legal cease-fire. The alternative is higher application fees, which most physicians would prefer to avoid. An option to avoid the release by paying a surcharge is not likely to be attractive. Physicians who expect to pass, or who are satisfied with the Board's internal appeal processes, would not pay the premium for an option to litigate. A process of sifting would lead to a situation in which the set of persons wanting the option to litigate was very likely to use the option it had paid dearly for; in that event, however, the premium charged for a chance to litigate would approximate the Board's anticipated legal defense costs, making the option unattractive even to the most disgruntled applicants. Plaintiffs, at all events, did not offer to pay a higher fee to purchase a litigation option and therefore are in no position to complain.

Perhaps, however, the Board lacks authority to set its admissions criteria. If so, the release, as one requirement of making an application, would be in jeopardy. Illinois does not

permit professional associations full sway over admissions criteria if membership is an "economic necessity." *Treister v. American Academy of Orthopaedic Surgeons, 78 Ill. App. 3d 746, 755, 396 N.E.2d 1225, 1231, 33 Ill. Dec. 501 (1st Dist. 1979)*. But both plaintiffs are successful practitioners, and in their reply brief they stoutly deny that they are trying to make the showing required by Treister. (That case held that membership in the American Academy of Orthopaedic Surgeons is not an "economic necessity" for the practice of orthopaedic surgery; Illinois likely would say the same about Board certification for a psychiatrist.) Having forsworn the "economic necessity" route, plaintiffs offer two reasons why the Board lacks power to condition application on a promise not to sue.

One is that the Board is not a private association at all. According to plaintiffs, the Board is a "state actor," and the Constitution entitles them to more elaborate procedures than the Board provides. We agree with the district court, however, that the Board is a private association. It does not issue licenses to practice; it simply certifies achievement of a standard of excellence. It does not wield any state power and therefore need not use the procedures the due process clause requires of the government. *NCAA v. Tarkanian, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988)*, held that the National Collegiate Athletic Association is not a state actor, even though it is the principal regulator of collegiate athletics and many of its members are state universities. Ours is an easier case, because the members of the Board are themselves private actors. That states make certification by the Board a prerequisite for some public positions does not convert the Board into a state actor, any more than a state's insistence that some employees have advanced degrees converts every college and university into a state actor. If the Board's certification

processes are unreliable, that may be a reason why the state should not depend on them; public beliefs that they are reliable (and consequent willingness to rely) do not bestow governmental power on the Board. State and local governments are responsible for their own decisions, and persons aggrieved by those decisions must complain against their authors (the states themselves) rather than against the Board.

Antitrust is a different matter. It is designed to regulate how private parties arrange their affairs--to protect the public from how private producers regulate their affairs. A bylaw of the Hardwood Manufacturers' Association committing the members to resolve all differences by appeal to the board of governors would not be effective in antitrust law, which is based on a suspicion that agreements among producers undermine the interests of consumers. Cf. *American Column & Lumber Co. v. United States, 257 U.S. 377, 66 L. Ed. 284, 42 S. Ct. 114 (1921).* A no-suit agreement may be one of the devices for shoring up a cartel. Consumers, strangers to such agreements, gain by turning producers against one another, the better to expose violations. That is the premise of the Supreme Court's conclusion that the doctrine of in pari delicto does not foreclose antitrust litigation. *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968).* Producers may agree to arbitrate their antitrust disputes--certainly so for international transactions, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985),* and likely so for domestic transactions, *Nghiem v. NEC Electronic, Inc., 25 F.3d 1437 (9th Cir. 1994).* But the premise of these decisions is that the arbitrators are neutrals willing to apply antitrust principles. A contract transferring antitrust disputes not to a disinterested umpire, but to the board of directors of a producers' association, is antithetical to consumers' welfare.

We therefore conclude that plaintiffs' release does not prevent them from making an antitrust claim in court.

Seeking to block the antitrust claim at the threshold, the Board invokes the rule that agreements between corporations and their employees, divisions, or subsidiaries are not the kind of "conspiracies" against which the antitrust laws are directed. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).* The complaint names only two defendants: the Board and its executive director. So much for the antitrust claim, defendants insist. Plaintiffs reply that the Board and its employees have conspired with promoters of examination-review courses. Comes the rejoinder: argument in a brief does not count, and the complaint does not contain the facts needed to establish either a conspiracy or an injury to consumers.

Indeed, the principal theme of defendants' brief is that we must ignore their adversary's briefs and appendix because they advert to facts that do not appear in the complaint. Yet complaints need not contain elaborate factual recitations. They are supposed to be succinct. Fed. R. Civ. P. *8; American Nurses' Association v. Illinois, 783 F.2d 716 (7th Cir. 1986).* "Although a plaintiff may not amend the complaint on appeal to state a new claim, it may point to (or even hypothesize) facts consistent with the existing language of the complaint showing such an entitlement." *American Inter-Fidelity Exchange v. American Re-Insurance Co., 17 F.3d 1018, 1022 (7th Cir. 1994*) (collecting authority). Any need to plead facts that, if true, establish each element of a "cause of action" was abolished by the Rules of Civil Procedure in 1938, which to signify the radical change from code pleading also replaced*Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992).* "cause of action" with "claim for relief."

See One pleads a "claim for relief" by briefly describing the events. At this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Matching facts against legal elements comes later. And after FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990), American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982), and National Society of Professional Engineers v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978),* no one could deny that the conduct of a professional association has some potential to violate the antitrust laws.

What sinks plaintiffs' antitrust claim is not the skimpiness of their complaint but the information they provided in response to the district judge's probing. He asked counsel to specify what consumers, in what market, were injured by the Board's practices. Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason. *Hardy v. City Optical, Inc., No. 94- 1262 (7th Cir. Nov. 7, 1994), slip op. 3; Chicago Professional Sports Limited Partnership v. National Basketball Association, 961 F.2d 667, 673 (7th Cir. 1992); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1435 (7th Cir. 1986); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 670-74 (7th Cir. 1985).* (Plaintiffs do not contend that the certification of medical professionals is illegal per se.) It is hard to see how the Board's activities could amount to an exercise of market power, which entails cutting back output in the market and thus driving up prices to consumers. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1335 (7th Cir. 1986).* After all, plaintiffs already are sellers in the market for psychiatric

services; turning down their applications for certification does not remove their output from the market and therefore does not raise prices to consumers. Perhaps one could construct a theory that, by withholding certification from "deserving" specialists, the Board prevents consumers from shopping intelligently for psychiatric services--though that sounds more like a theory of deception than of antitrust liability. See *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989).* No matter; it is not the plaintiffs' theory.

When challenged, plaintiffs revealed that they want to show injury to producers. According to plaintiffs' brief, the Board's oral examination is especially hard on physicians born outside the United States (and for whom English is not their native language), with the result that these physicians' earnings fall short of their colleagues who were born in the United States. The claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2586-90 (1993); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Indeed, it does not even state an antitrust injury. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977).* Intentional adverse decisions on the basis of physicians' ancestry might violate one of the anti-discrimination statutes. Plaintiffs do not allege intentional discrimination; they contend only that the oral examination has a disparate effect. At all events, the Sherman Act is not a precursor to the Civil Rights Act of 1964. It is aimed at

protecting consumers from high prices. Plaintiffs, who want to obtain a credential that will help them charge higher prices, have pleaded themselves out of court on the antitrust claim.

One final subject requires a brief examination. Illinois does not enforce contracts exculpating persons from the consequences of their wilful and wanton acts. *Downing v. United Auto Racing Association, 211 Ill. App. 3d 877, 570 N.E.2d 828, 156 Ill. Dec. 352 (1st Dist. 1991); cf. Schek v. Chicago Transit Authority, 42 Ill. 2d 362, 247 N.E.2d 886 (1969).* Plaintiffs assert that the Board committed fraud and defamed them, which could fit the category "wilful and wanton." But we have no idea what the fraud consists in, because plaintiffs have not pleaded their claim with the particularity required by Fed. R. Civ. P. 9(b). See *DiLeo v. Ernst & Young, 901 F.2d 624 (7th Cir. 1990).* As for defamation: the only statement the complaint mentions is that plaintiffs failed the oral exam, which happens to be true. This statement is not even defamatory, for the proposition "X is not among the best practitioners" does not imply that X is unfit for his profession. These claims, too, were properly dismissed on the pleadings.

AFFIRMED

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

RAFAEL SANJUAN, M.D., and

MARCELLO A. MAVIGLIA, M.D.,
Plaintiff

v.

THE AMERICAN BOARD OF PSYCHIATRY
AND NEUROLOGY, INC.,
Defendant-Corporation

STEVEN C. SCHEIBER, M.D.,
Defendant-Corporate Officer.

No. 93 C 5806

March 2, 1994, Decided
March 3, 1994, Docketed

JUDGES: MORAN

OPINIONBY: JAMES B. MORAN

OPINION: MEMORANDUM AND ORDER

Plaintiffs, Drs. Rafael Sanjuan (Sanjuan) and Marcello Maviglia (Maviglia), were denied certification by defendant, American Board of Psychiatry and Neurology (ABPN). Defendant Stephen Scheiber, M.D. (Scheiber) is an officer of ABPN. [footnote 1] After Sanjuan and Maviglia were denied certification, they brought this action against ABPN for violations of state common law, federal law and the Constitution. Jurisdiction is based both upon diversity and federal law. ABPN now moves to dismiss the complaint. For the reasons stated below, the motion is granted.

FACTS

ABPN administers a two-part examination to licensed psychiatrists and certifies them if they pass. Both Sanjuan and Maviglia are fully licensed psychiatrists. They passed the written examination in their first attempt but failed the oral examination, despite taking it more than once. In light of their failures they allege that ABPN's conduct constitutes defamation, fraud, discrimination, and violations of antitrust laws and due process requirements.

DISCUSSION

Determining whether ABPN's certification process constitutes state action affects several arguments made by both sides. Neither party disputes that ABPN is authorized to certify psychiatrists, so this court need only address whether ABPN should be considered a state actor. See *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 2082-83, 114 L. Ed. 2d 660 (1991).* The United States Supreme Court has articulated several tests or factors used to determine whether a private party is considered a state actor. See *Lugar v.*

Edmondson Oil Co., 457 U.S. 922, 939, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1981). Plaintiffs' complaint arguably implicates the "public function" and "nexus" tests. Id. To satisfy the "public function" test plaintiffs must show that ABPN performs a function that has been "traditionally the exclusive prerogative of the State." *Rendell-Baker v. Kohn, 457 U.S. 830, 842, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974).* They fail to do so. Certification above and beyond licensure is not "traditionally the exclusive prerogative of the State." The fact that certification serves the public does not render it state action. *Rendell-Baker, 457 U.S. at 842; see also Shannon v. Shannon, 965 F.2d 542, 547 (7th Cir. 1992).* Plaintiffs also fail to satisfy the "nexus" test.

There is no indication of government responsibility for, or even involvement in, ABPN certification decisions. See *Edmonson, 111 S. Ct. at 2083; Rendell-Baker, 457 U.S. at 839-841; Anderson v. Nat'l R.R. Passenger Corp., 754 F.2d 202, 204-5 (7th Cir. 1984). Therefore, ABPN is not a state actor. Accord Patel v. American Bd. of Psychiatry and Neurology, 1989 WL 152816, (N.D.Ill.).*

ABPN argues that this court cannot review the denial of certificatio by a private organization. In *Treister v. American Academy of Orthopaedic Surgeons, 78 Ill. App. 3d 746, 33 Ill.Dec. 501, 507, 396 N.E.2d 1225 (Ill.App. 1979)*, the court held that "courts can review the application procedures of a private association when membership in the organization is an economic necessity." As indicated above, ABPN is a private organization. Although ABPN certification -- unlike licensure -- is not necessary to practice psychiatry, it can improve a psychiatrist's professional opportunities. However, plaintiffs allege in very cursory fashion that ABPN has harmed them

economically and professionally. (Cplt. at P 43.) They do not come close to alleging that certification is an "economic necessity," and hence their complaint does not satisfy the high Treister standard. See *Nat'l Ass'n of Sporting Goods v. F.T.L. Marketing, 779 F.2d 1281, 1285-86 (7th Cir. 1985); contrast Busse v. American Bd. of Anesthesiology, 1992 WL 372996, (N.D.Ill.)* (court reviewed voluntary association's actions where plaintiff "alleged that one cannot practice as an anesthesiologist at any hospital in the Chicago area absent board eligibility or certification by the defendant"). Therefore, this court cannot review ABPN's application procedures based upon this complaint. [footnote 2].

In counts III and V, plaintiffs allege that ABPN deprived them of notice or a fair hearing, and subjected them to disparate and unequal treatment. The Fifth and Fourteenth Amendments apply only to state actors and, as indicated above, ABPN is not a state actor. See Lugar, 457 U.S. at 936 (party charged with depriving a federal right must "fairly be said to be a state actor"); *Smith v. Blue Cross & Blue Shield, 724 F. Supp. 618, 620 (E.D. Wis. 1989), aff'd Smith v. Blue Cross & Blue Shield, 959 F.2d 655 (7th Cir. 1992), citing Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988) (Fourteenth Amendment); San Francisco Arts & Athletics v. U.S. Olympic Comm., 483 U.S. 522, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987) (Fifth and Fourteenth Amendments); Rendell-Baker, 457 U.S. at 837-39 (Fourteenth Amendment).* Plaintiffs also fail to state a claim under Title VII, and have not pursued the administrative route that is a prerequisite for doing so. Therefore, counts III and V are dismissed.

In counts VI and VII, plaintiffs allege violations of antitrust laws by ABPN. The jurisdictional requirement for antitrust

actions is the existence of a sufficient nexus between the complained-of conduct and interstate commerce. See *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 1848, 114 L. Ed. 2d 366 (1991); Nelson v. Monroe Regional Med. Ctr., 925 F.2d 1555, 1565 (7th Cir. 1991).* Here, there is a nexus between ABPN's application process andinterstate commerce that may be sufficient to satisfy the jurisdictional requirement. However, plaintiffs only allege improper conduct by ABPN and one of its officers, and "there cannot be an 'intra-enterprise' conspiracy under antitrust laws." *Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 779-80 (N.D.Ill. 1993), citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).* Additionally, plaintiffs must allege injuries to a market as well as to themselves. *Car Carriers v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984); Vakharia, 824 F. Supp. at 779.* In other words, the allegedly improper conduct must harm competition, not just a competitor. Plaintiffs here allege harm to themselves, but do not allege harm to any market -- lack of ABPN certification does not limit their availability to consumers because they can still practice psychiatry. Therefore, counts VI and VII are dismissed.

In count VIII, plaintiffs allege fraud by ABPN.[footnote 3] . To sufficiently plead a fraud action under Illinois law a plaintiff must allege that the defendant (1) made a material statement that was untrue; (2) knew the statement was untrue or willfully ignored its truth or falsity; (3) made the statement to induce reliance and succeeded in inducing the plaintiff's detrimental reliance. *Johnson v. George J. Ball, Inc., 248 Ill. App. 3d 859, 187 Ill.Dec. 634, 640, 617 N.E.2d 1355 (Ill.App. 1993).* Rule 9(b) of the Federal Rules of Civil Procedure provides that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity."

Plaintiffs' complaint employs the language of fraud claims, but only in a conclusory manner, without sufficient supporting factual allegations. [footnote 4] Though the complaint may contain hints of allegations sufficient to state a claim for fraud, plaintiffs do not state their claim with particularity. Therefore, count VIII is dismissed.

In count IX, plaintiffs allege defamation by ABPN. "Truth is a defense to a defamation action. To establish such a defense defendant need only demonstrate the truth of the 'gist' or 'sting' of the defamatory material. Thus, only 'substantial truth' is required for this defense, which may be raised by a motion to dismiss [citations omitted]." *American Int'l Hosp. v. Chgo Tribune Co., 136 Ill. App. 3d 1019, 91 Ill.Dec. 479, 482, 483 N.E.2d 965 (Ill.App. 1985).* Plaintiffs allege that ABPN disseminated defamatory information about them, but the gist of that information is that ABPN did not certify plaintiffs because they did not pass the exam, which is in fact true. Therefore, count IX is dismissed.

Finally ,[footnote 5] plaintiffs allege in count X that the release of ABPN they signed as a part of their certification application is invalid. ABPN, on the other hand, moves to dismiss plaintiffs' complaint on the strength of that release. A clause limiting liability is generally enforced under Illinois law unless it is contrary to public policy, or there is something in the parties' relationship militating against its enforcement. *Mulliken v. Lewis, 245 Ill. App. 3d 512, 185 Ill.Dec. 730, 734, 615 N.E.2d 25 (Ill.App. 1993). The court in Ainsworth Corp. v. Cenco, 107 Ill. App. 3d 435, 63 Ill.Dec. 168, 172, 437 N.E.2d 817 (Ill.App. 1982),* observed that "no form of words, no matter how all encompassing, will foreclose scrutiny of a release, or prevent a reviewing court from inquiring into

surrounding circumstances to ascertain whether it was fairly made." Although plaintiffs' allege few (if any) facts regarding the release's invalidity, based upon the principles above the court declines to dismiss plaintiffs' complaint on the strength of the release alone.

CONCLUSION

For the reasons stated, the motion to dismiss is granted.

\ss\
HON. JAMES B. MORAN,
Chief Judge, U.S. District Court

Date: March 2, 1994.

FOOTNOTES TO APPENDIX "C"

1. The court's conclusions apply equally to ABPN and defendant Scheiber, and therefore the court does not distinguish between the two in its decision.

2. Most likely, this conclusion obviates the need to further discuss plaintiffs' Illinois law claims, which basically express displeasure with ABPN's application process. This would not be true if the Illinois claims made allegations about conduct extrinsic to the application process, but they do not.

Nonetheless, the court will address plaintiffs' Illinois law claims as they appear in the complaint.

3. As alluded to in note 2, plaintiffs' apparent attempt to circumvent Treister with this claim must fail because it concerns ABPN's application process.

4. In P 21, plaintiffs allege that ABPN "misrepresents the process and subsequent grading of the oral examination process . . ." In P 22, plaintiffs allege that ABPN "misrepresents . . . that candidates will be assured of the following . . ." Plaintiffs allege in P 23 that ABPN "was made aware of misrepresentations and other inequities." In P 24, plaintiffs allege that ABPN "has chosen to continue to disseminate information tailored to falsely represent information to board certifying candidates." However, plaintiffs never clearly explain how or why these are misrepresentations.

5. The court also dismisses counts I, II, and XI. Plaintiffs do not make clear the possible legal bases for these claims, and the court concludes they are without merit.